incentive to favor carriage of less popular programming from which the cable operator must share revenues with other program investors:

> A cable operator contemplating discrimination would have to balance any benefits to the network in which it has an interest against the costs of decreased subscribership and lower subscriber fees that would result from withholding desirable programming. When a cable operator has only a minority interest in the network, as is common, such discrimination appears even more unlikely, since the operator would receive only a portion of any network benefits.

Crandall Analysis at 5. Channel valuation models similarly have recognized a programming service's ability to attract viewers as the basis of its "revenue contribution." See Paul Kagan Associates, Inc., Marketing New Media 1 (Jan. 15, 1990).

Likewise, an MSO which owns an interest in a particular cable system but does not control the programming decisions of that system does not have the ability to favor its affiliated programming as a result of its ownership interest in the system. On the other hand, an MSO which has a smaller equity interest in a particular system but operates that system may derive some measure of "power" from its ability to make programming decisions with respect to the system. Consequently, Liberty submits that the channel occupancy limits should apply only to programming on systems operated by the affiliated MSO or systems in which that MSO holds a controlling voting equity interest. However, the channel occupancy limits should not extend to systems operated by other entities in which an MSO holds a less-than-controlling interest because the MSO does not and cannot exercise control over the programming decisions of such systems. Consequently, the MSO cannot use those systems to discriminate in favor of affiliated programming, and channel occupancy limits are unnecessary.

In short, an attribution standard based on control will preserve much of the incentive for cable investment in new programming services without substantial risk to programmers, other distributors or viewers. If the Commission nonetheless determines that an attribution standard lower than actual control is needed to address the potential for discrimination, Liberty respectfully submits that the standard should be substantially higher than the 10 percent standard proposed for broadcast attribution. Such higher standard is fully justified by the different purposes of and market conditions underlying this attribution standard, absence of discrimination in the actual carriage performance of cable operators, practical disincentives to such discrimination by cable operators whose revenues are principally derived from subscriber payments, and the loss of cable operator investment in diverse programming that otherwise would result from an unreasonably low attribution standard.

2. **Must-Carry, PEG, And Leased Access Channels Should Be Included In Calculating Any Channel Occupancy Limit.**

The Commission seeks comment "on the procedures that should be used in calculating the cable channel occupancy limits" required by Section 613(f)(1)(B) and specifically questions whether "it is appropriate to subtract" must-carries, PEG and leased access channels as suggested in the Senate Report. Notice at ¶¶47-48. Because these channels offer access to unaffiliated programmers -- including the specific programmers whose complaints gave rise to the Congressional concerns underlying the channel occupancy limits -- they must be included in the calculation of any such limits.

Section 614(b)(1)(B) requires the operator of a cable system with more than 12 activated channels to devote up to one-third of those channels to carriage of local commercial television broadcast stations. In addition, Section 615(b)(1) requires operators of cable systems with more than 36 activated channels to carry "any qualified local noncommercial educational television station requesting carriage." Finally, Section 612(b)(1)(A) requires the operator of a cable system with 36 or more activated channels to devote 10 percent of those channels to "commercial use by persons unaffiliated with the operator." Operators of systems with 55 or more activated channels must devote 15 percent of those channels to leased access use. Section 612(b)(1)(B). Although Liberty believes that statutory must-carry and mandatory access obligations are unconstitutional, must-carry, PEG and leased access requirements, if upheld, would ensure that at least one-third of activated cable channels on most cable systems will be devoted to programming not affiliated with the cable operator.[9]

There is no reason to subtract must-carries, PEG and leased access channels from overall channel capacity before applying the channel occupancy limit. Broadcast stations clearly are a major source of programming unaffiliated with the cable operator. Moreover, the Commission repeatedly has acknowledged that broadcast stations provide programming which is competitive with basic cable programming services. Notice at ¶48; Report to Congress, 5 FCC Rcd. at 4995-96. Further, the very testimony cited by Congress as the basis of its concern that vertical integration gives cable operators the incentive and ability to favor affiliated programming services and disadvantage other services expressly refers to "local Independent broadcasting stations" and was offered by representatives of the Association of Independent Television Stations. Senate Report at 25-26 n.61.

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[9] Even in the absence of must-carry obligations, cable operators carry substantial numbers of local television signals as part of their basic service offerings. Further, local franchise agreements often include local access requirements.

By including these channels in the total number of channels upon which channel occupancy limits are based, the Commission will only be recognizing their clear role as outlets for unaffiliated programmers. The same rationale mandates inclusion of PEG and leased access channels which, by definition, provide a vehicle for programming over which the cable operator can exercise no substantive control (except under applicable obscenity and indecency regulations).

3. The Channel Occupancy Limit Should Permit The Carriage Of A Significant Number Of Affiliated Programming Services.

The Commission specifically requests comment on the procedures for calculating channel occupancy limits as outlined in the Senate Report, including the "hypothetical 20% channel occupancy limit." Notice at ¶47. Clearly, the issue of an appropriate channel occupancy limit is interrelated with the ownership attribution standard adopted by the Commission. Particularly when coupled with a lower attribution standard, the Senate Report's hypothetical 20 percent channel occupancy limit is unnecessary to address the potential harm identified by Congress and would unreasonably stifle cable operator investment in diverse programming.

At the outset, Liberty notes that the 54-channel system postulated in the Senate Report actually is representative of only about 10 percent of all systems in the country.

See Television And Cable Factbook, Services Volume No. 61 (1993 ed.), at I69 (only 10.40 percent of all cable systems have channel capacity of 54 or more channels). Consequently, calculation of channel capacity limits according to the procedure suggested in the Senate Report is likely to result in many cases in the six-channel minimum to which the Senate Report refers. Senate Report at 80. Depending upon the attribution standard adopted by the Commission, such limits may deprive substantial numbers of cable subscribers of the ability to receive popular programming services in which cable operators hold an attributable interest. For example, Liberty has ownership interests exceeding 10 percent in nine national programming services, as well as a number of regional services.

In analyzing vertical foreclosure issues, courts consistently have found that a very substantial percentage of the market must be foreclosed even to require further analysis of potential competitive injury. See Sewell Plastics, Inc. v. Coca-Cola Co., 720 F. Supp. 1196, 1212-14 (W.D.N.C. 1989), aff'd, 912 F.2d 463 (4th Cir. 1990), cert. denied, 111 S. Ct. 1059 (1991) (summary judgment for defendant where market foreclosure of 40 percent would not enable cooperative to increase prices profitably above competitive levels); Gonzales v. Insignares, 1985-2 Trade Cas. (CCH) ¶66,701 (N.D. Ga. 1985) (summary judgment for defendant where potential foreclosure involved only 40 percent of relevant market).

Further, the level of potential nationwide "foreclosure" resulting from a given channel occupancy limit will be substantially less than that limit because not all cable operators have ownership interests in programming and not all cable operators with such interests will fully utilize the permitted channel occupancy. In any event, the limits on horizontal ownership of cable systems to be imposed by the Commission also will minimize any potential foreclosure from the vertical ownership of cable programming services.

Depending upon the Commission's attribution standard, the programming interests of a number of cable operators, including Liberty, already would exceed the hypothetical 20 percent channel occupancy limit noted in the Senate Report. However, notwithstanding such ownership interests, no pattern of discrimination has been observed. The absence of such discrimination suggests that attribution and channel occupancy limits which, at a minimum, preserve existing ownership patterns and permit reasonable additional growth would be appropriate. To do otherwise would directly conflict with Congress' direction to the Commission that it "not impose limitations which would impair the development of diverse and high quality video programming." Section 613(f)(2)(G).

4. Channel Occupancy Limits Should Extend Only To Video Programming Affiliated With The System Operator.

The Commission specifically questions whether channel occupancy limits are "intended to apply to any cable affiliated programmer" or only to those "programmers affiliated with the particular cable operator" of the system in question. Notice at ¶49. Although the Senate Report suggests that a separate limit might apply to the programming services affiliated with each multiple system operator, such an approach to channel occupancy limits undoubtedly would limit the availability of popular programming, would stifle investment in new programming services, and bears no relationship to the potential harm which Congress sought to address.

As set forth in the Notice, the purpose of the channel occupancy limits is "to reduce the incentive and ability of cable operators to favor their affiliated programming services to the disadvantage of unaffiliated programmers." Notice at ¶43. Clearly, cable operators would not have an incentive to favor programmers affiliated with other cable operators. See House Report at 41 (allegations that some cable operators are "denying system access to programmers affiliated with rival MSOs..."). Thus, there would be no reason to impose channel occupancy limits on program services owned by cable operators other than the operator of the system in question. Such limits do not further the objectives of the statute and will serve only to deprive subscribers of programming choices.

Further, the channel occupancy limits extend only to video programming, i.e. "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. §522(19). Thus, services such as X*PRESS Executive and X*PRESS X*CHANGE, which are provided by a Liberty subsidiary and received over a subscriber's computer, do not constitute video programming subject to the channel occupancy limits. Similarly, a Liberty subsidiary is jointly developing with TV Guide an interactive electronic television listing guide known as "TV Guide on Screen," which again is not a "video programming service." The Commission's rules should confirm that these kinds of non-video programming services clearly are outside the scope of the channel occupancy limitations.

5. Channel Occupancy Limits Should Not Apply To Regional And Local Programming Services, Systems Facing Effective Competition And Systems With Expanded Channel Capacity.

The Commission has recognized that, due to the "dynamic nature of the communications marketplace," inflexible channel occupancy limits could substantially "impair the development of diverse and high quality video programming." Notice at ¶53. Consequently, the Commission questions whether channel occupancy limits should apply to: (a) regional programming networks (Notice at ¶48); (b) systems facing effective competition (Notice at ¶54); and (c) systems having substantial channel capacity (Notice at ¶53).

The Commission should exempt local and regional programming from the channel occupancy limits. The Commission and Congress repeatedly have emphasized the public interest benefits derived through the local origination of programming. See, e.g. 1992 Cable Act, §2(a)(10) ("substantial government interest" in the local origination of programming). Although most regional networks to date have involved sports-oriented programming, local and regional news, public affairs and other programming is being developed and carried on cable systems at an ever-increasing rate. See, e.g., Multichannel News, Nov. 30, 1992, at 80-82 (Jade Plus joint venture between Viacom and TVB of Hong Kong provides programming for large Cantonese population in San Francisco; Simmons Cable system in Long Beach, California provides one channel featuring Cambodian, Vietnamese and Filipino programming). These program services clearly promote diversity and localism in cable programming, and the Commission should not discourage cable operator development of such programming by including it within the applicable channel occupancy limits.

The Commission also should clarify that the channel occupancy limits do not include locally originated "programming" services such as airline schedules, local weather channels, community bulletin boards and job listings, and real estate and automobile sales channels.[10] The Notice indicates that "vertical integration" in the context of the channel occupancy limits "refers to common ownership of both cable systems and program networks, channels, services or production companies." Notice at ¶41 (emphasis added). Application of the channel occupancy limits to such locally originated channels would decrease their carriage on cable systems, depriving subscribers of valuable local information and services.

Because the channel occupancy limits are intended to prevent cable operators from becoming a bottleneck to the distribution of programming services, they should cease to apply where alternative distribution media are present. The 1992 Cable Act is not intended to guarantee that all programming services are distributed to viewers by cable television systems. Thus, where alternative distribution media provide access to viewers, the cable operator can no longer be considered a bottleneck to the distribution of such services. Clearly, where effective competition exists, viable alternative distribution media are present. However, because the effective competition standards were created to ensure that

[10] Of course, as set forth supra at 25, to the extent that bulletin boards and similar alpha-numeric listing channels do not constitute video programming under 47 U.S.C. §522(19), the channel occupancy limits are not applicable.

sufficient competition exists to control the price of cable service, Liberty believes that a different and lower penetration threshold is appropriate for determining whether viable alternative distribution media outlets exist.

Likewise, the channel occupancy limits should not apply where channel capacity exceeds a specified number of channels. Where such expanded channel capacity exists, the cable operator can no longer be regarded as having any incentive to act as a bottleneck for non-affiliated programming services.

6. The Commission Should Grandfather Existing Relationships And Permit Waivers To Accommodate Subscriber Program Preferences.

The Commission proposes "to grandfather any existing vertical relationships which exceed the channel occupancy limits at the time such limits are adopted." Notice at ¶55. The Commission's proposal would permit existing carriage levels for affiliated programming which exceed the new rules, but freeze carriage of affiliated programming at existing levels. Consequently, the Commission should adopt a more flexible approach to grandfathering existing relationships which exceed any new channel occupancy limits.

For example, under the Commission's proposal, new program services in which cable operators already have invested but which have not yet been "rolled out" would be excluded from carriage on systems already at the new channel occupancy limit. Further, companies such as Liberty that are constantly exploring new programming alternatives should not be foreclosed from developing or investing in additional programming services. In order to avoid penalizing cable operators who already have invested in new programming services, the Commission should establish "grandfathered" channel occupancy limits at a level two or three channels above existing carriage levels where new channel occupancy limits are lower than existing carriage levels.

Finally, the channel occupancy limits are intended to prevent discriminatory bottlenecks -- not the provision of programming services sought by viewers. Consequently, the Commission should establish a waiver procedure by which a cable operator can demonstrate that an affiliated programming service is being added in response to viewer demand regardless of the channel occupancy limits.

III. Horizontal Concentration Limits Should Be National Standards Based On A Percentage Of Homes Passed.

Section 11 of the 1992 Cable Act adds subsection 613(f)(1)(A) to the Communications Act, which requires the Commission to prescribe rules "establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person or in which such person has an attributable interest." The Commission states that this provision "is intended to address Congress' concern regarding increasing horizontal concentration in the cable industry," which may have "the potential to create barriers to entry for new programmers and to reduce...the number of media voices available to consumers." Notice at ¶¶31-32. At the same time, Congress and the Commission concede that "consolidation in the cable industry [has] produced significant benefits and efficiencies." Notice at ¶34; Senate Report at 33; House Report at 43. Consequently, the Commission's regulations under Section 613(f)(1)(A) must be carefully crafted to preserve the public interest benefits resulting from consolidation while protecting against the potential harm identified by Congress.

A. Any Horizontal Ownership Limits Should Apply Nationwide.

As an initial matter, the Commission questions "whether regional or national subscriber limits, or both, are necessary or appropriate to implement the objectives of the 1992 Cable Act." Notice at ¶35. After its recent and comprehensive examination of the cable industry, the Commission concluded that "the current level of horizontal concentration in the cable industry is not sufficient to warrant regulatory intervention." Report to Congress, 5 FCC Rcd. at 5006. However, like the channel occupancy limits discussed above, the legislative history of Section 613(f) indicates that the Commission's discretion in this area has been limited to determining what, not whether, horizontal restrictions should be imposed. Senate Report at 80. Consistent with its prior conclusion and the statute's admonition that the Commission should "rely on the marketplace to the maximum extent feasible," the Commission's horizontal concentration regulations "should be the minimum necessary" marketplace intervention to address Congressional concerns about the potential for anticompetitive conduct. 1992 Cable Act, §2(b)(2); Senate Report at 18.

Any horizontal concentration regulations adopted by the Commission should be limited to concentration in terms of homes passed on a national level.[11] Although the Commission correctly states that regional concentration "is also mentioned" in the legislative history (Notice at ¶35), the statute and legislative history clearly focus on national concentration. See Senate Report at 34 ("To address the issue of national concentration in the cable industry...the legislation directs the FCC to place reasonable limits on the size of MSOs...." (emphasis added)). Moreover, national limits

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[11] Homes passed, rather than subscribers, provide the more appropriate benchmark. If subscribers were utilized, a cable operator might be penalized for increased penetration resulting from superior program offerings and customer service. Further, after the number of homes passed is ascertained by a cable operator, it should provide more regulatory certainty to that operator.

will address more directly the potential problems from horizontal concentration perceived by Congress.

The Senate Report indicates that Section 613(f)(1)(A) is intended to address two concerns arising from horizontal concentration in the cable industry. First, Congress apparently was concerned that such concentration may enable cable operators to "control the dissemination of information" by: (1) "slant[ing] information according to their own biases;" or (2) "provid[ing] no outlet for unorthodox or unpopular speech." Senate Report at 32. Second, horizontal concentration "can be the basis of anticompetitive acts." Id. at 33. These concerns already are addressed on a regional or local level through various Commission regulations.

The Commission has numerous cross-ownership and other restrictions in place at the local level to protect against undue concentration of media sources in a particular area. The presence of multiple television and radio stations, newspapers, and other outlets for local expression eliminates any possibility that a cable operator, even with substantial concentration of system ownership in a particular region, could "control the dissemination of information" in that region. Of course, carriage of local broadcast signals, whether voluntary or mandatory pursuant to the must-carry provisions of the 1992 Cable Act, eliminates any possibility that a cable operator could control the dissemination of news or other information over its cable system. Likewise, public and leased access channels provide substantial opportunities for the dissemination of unorthodox or unpopular news over a cable system without undue interference from the cable operator.[12] Thus, there is no reason for the Commission to consider regional concentration limits based on concern over the ability of a "media gatekeeper" to "control the dissemination of information."

Likewise, regional concentration limits are not necessary to address Congress' general concern over potential anticompetitive conduct arising from cable industry consolidation. The 1992 Cable Act imposes comprehensive behavioral regulations upon cable operators specifically to protect against anticompetitive conduct. <u>See</u> note 4, <u>supra</u>. Moreover, the Senate's concern in this area clearly was directed at the potential market power of MSOs "vis-a-vis the producers of programming" and whether "the large MSOs have the market power to determine what programming services can 'make it' on cable." <u>Senate Report</u> at 33. These concerns -- which clearly focus on national rather than regional or local concentration -- should be addressed only through reasonable national limits on subscribers which will serve to supplement existing anti-

[12] The Communications Act (as amended by the 1992 Cable Act) does impose certain additional obligations on the cable operator with respect to indecent or obscene programming on public or leased access channels. <u>See</u>, <u>e.g.</u>, Sections 611(e), 612(h) and 624(d).

trust laws. Finally, the leased access and PEG provisions provide viable access alternatives, particularly at the local and regional level. Because regional and local horizontal concentration restrictions plainly are unwarranted, the Commission should make clear that its national standards are preemptive.[13]

The statute and the legislative history provide some guidance to the Commission with respect to the appropriate national ownership concentration levels. The statute states that the Commission's horizontal concentration limits should "ensure that no cable operator or group of cable operators can unfairly impede...the flow of video programming from the video programmer to the consumer." Section 613(f)(2)(A). Thus, the Commission indicates that the appropriate limit would neither "create barriers to entry for new programmers" nor permit larger MSOs to achieve and maintain "sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services." Notice at ¶¶32-33. At the same time, the legislative history of Section 613(f)(1) states that this provision "does not imply that any existing company must be divested." Senate Report at 34.

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[13] Such preemption is not precluded by Section 613(d). The legislative history of that provision confirms that it was intended only to permit state or local franchising authorities to prohibit transfers involving cable system overbuilds. See House Report at 90-91.

Based on the economics of the program marketplace and the Senate Report's disclaimer of any intent to require divestiture by any company, a national ownership limit in the range of 35 to 40 percent of homes passed would preclude the potential bottleneck of concern to Congress.[14] Notice at ¶37. A unilateral refusal to deal by a single MSO controlling 40 percent of all cable television homes passed nationwide would, using conservative estimates, leave over 53 million homes passed and over 33 million subscribers available to new programmers seeking to distribute their services.[15] See Broadcasting, Feb. 1, 1993 at 58 (estimated total homes passed at 89,400,000 and total cable subscribers at 55,786,000 nationwide). Thus, a national limit in the range of 35 to 40 percent of all homes passed would create neither a substantial barrier to entry nor undue market power vis-a-vis programmers.

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[14] Congress and the Commission have indicated that TCI, the nation's largest multiple system owner, owned, controlled or had investments in systems serving approximately 24 percent of the nation's subscribers. Notice at ¶31; Senate Report at 32.

[15] This is more than the total number of cable subscribers nationwide in 1985. See Television And Cable Factbook, Services Volume No. 61 (1993 ed.) at I68. In 1984 there were no fewer than 49 national cable video program networks. National Cable Television Association, "Cable Television Developments," 7-A (Oct. 1992). Further, at least 39 national "basic" cable programming services presently have fewer than 33 million subscribers. CableVision, Sept. 21, 1992, at 54. Of course, numerous factors determine the number of subscribers necessary to launch any particular new cable service, including the programmer's production costs and overhead, pricing policy, and whether the service receives advertiser support.

B. An Attribution Standard Of Control Is Appropriate.

The Commission also seeks comment on "the appropriate standard for determining ownership of cable systems in connection with the application" of any horizontal concentration limit. Notice at ¶38. The Commission again notes that the statute provides no ownership attribution threshold for horizontal concentration limits and the legislative history states only that the Commission should use either the broadcast attribution standards included in Section 73.3555 of the rules "or other criteria the FCC may deem appropriate." Notice at ¶38; Senate Report at 80. Because the broadcast ownership attribution standards promote different policies, they should not be applied to horizontal concentration limits pursuant to Section 613(f)(1)(A).

As set forth above, Congress' purported concern about a cable operator's ability to "control the dissemination of information" is addressed through a variety of marketplace and regulatory mechanisms other than the horizontal concentration limits contemplated here. Must-carry obligations, public and leased access requirements, program access rules and channel occupancy limits place substantial regulatory restrictions on a cable operator's ability to "control the dissemination of information" -- in addition to the marketplace realities of television, radio, newspapers and countless other information outlets beyond the control of the cable operator. Moreover, as a practical matter, a cable operator providing multiple channels of programming to consumers will provide a diversity of programming over those channels to further its financial self-interest. Thus, the focus of Section 613(f)(1)(A) is not the diversity of information available to cable subscribers; it is the alleged market power of the cable operator vis-a-vis programmers. See Senate Report at 33.

Clearly, the broadcast attribution standards are overly restrictive in the context of the economic policies underlying Section 613(f)(1)(A). The Commission has acknowledged that where the primary purpose of regulations is not the promotion of First Amendment goals, but rather the promotion of competition or other economic objectives, more lenient attribution standards are appropriate. See, e.g., Corporate Ownership Reporting And Disclosure By Broadcast Licensees, 97 F.C.C.2d 997, 1009-10 (1984), on recon., 58 R.R.2d 604 (1985), on further recon., 1 FCC Rcd. 802 (1986) (higher attribution standards appropriate for alien ownership of broadcast facilities and for non-broadcast regulations "precluding collusive or anticompetitive economic behavior.") Liberty submits that control, either through equity ownership or operational management of a particular system, should be the appropriate attribution standard for Section 613(f)(1)(A).[16]

[16] However, if the Commission is inclined to attribute non-controlling interests in such systems, it should use a sliding scale of attribution so that only that percentage of

IV. Anti-Trafficking Rules Should Be Prospectively Applied, Limited To Transfers Of Controlling Interests, And Inapplicable To Non-Taxable, Pro Forma, Or Government Required Transfers.

The Commission states that the anti-trafficking provisions of the 1992 Cable Act are "largely self-executing and, thus, became effective on December 4, 1992." Notice at ¶7. The statute adds a new Section 617 to the Communications Act, which provides that, with certain exceptions, a cable operator may not "sell or otherwise transfer ownership in a cable system within a 36-month period following either the acquisition or the initial construction of such system by such operator." Section 617(a). The Commission acknowledges that "[n]either the 1992 Cable Act nor its legislative history makes plain Congress' rationale in enacting the anti-trafficking rule" although the House Report indicates that Congress may have intended to restrict "profiteering transactions which are likely to adversely affect cable rates or service." Notice at ¶4. Consequently, the Commission seeks comment on "the proper interpretation" of the rule and "an appropriate system of implementation." Id.

As an initial matter, the Commission questions whether "existing Commission rules restricting the transfer

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the total subscribership of the system equal to the MSO's equity ownership is attributed to the MSO for horizontal concentration purposes. Of course, even in these instances, there should be no attribution where the MSO's equity interest in the system is less than 10 percent or there is a single majority shareholder.

of broadcast licenses and construction permits" should be applied to determine whether a particular transfer of ownership in a cable system should be subject to the three-year holding requirement. Notice at ¶10. Although certain elements of the broadcast rules may be useful in developing rules to implement the anti-trafficking provisions of the 1992 Cable Act, the broadcast rules promote a fundamentally different purpose than Section 617(a). In fact, the Commission determined in 1982 that the anti-trafficking rules applicable to broadcast stations -- which included a three-year holding period substantially similar to Section 617(a) -- were contrary to the public interest. Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfers of Control), 52 R.R.2d 1081, 1086-90 (1982), on recon., 99 F.C.C.2d 971 (1985) ("Elimination of Broadcast Three-Year Rule").

The Commission determined that the three-year holding requirement for broadcast licensees adversely affected the public interest in several ways. First, the rule "may in fact cause deterioration of service" by forcing an "owner unable or unwilling to continue station operation" to retain the license while denying entry to a buyer "willing and able to pay the market price [and]...to deliver the service audiences want." Id. at 1087. The Commission also concluded that the rule was not necessary "to regulate advertising excesses" stemming from "high station prices which might be caused by" speculation in broadcast licenses. Instead, the Commission determined that market forces, combined with license renewal requirements, were more than sufficient to discourage such practices. Id. at 1087-88. Finally, the Commission noted that even a "speculator" could serve the public interest by "infus[ing] new capital and/or ideas into a failing station, making it more responsive to its audience." Id. at 1088. Consequently, the Commission eliminated its anti-trafficking policy for broadcast licenses, retaining only the existing provisions of Section 73.3597 which apply a one-year holding period to transfers of construction permits, subject to certain exceptions. That rule, however, "does not derive from our historic concerns regarding trafficking, but, rather, from our desire to prevent abuse of the Commission's licensing processes." Id. at 1090.

Liberty submits that the same public interest considerations which led to the elimination of the three-year rule in broadcasting support a narrow interpretation of the anti-trafficking provisions of Section 617(a). "Certainly, the public is ill-served by forcing a licensee [or system operator] who is unwilling or unable to continue operation... to struggle along until three-years has elapsed" when there are willing buyers ready to take over system operations. Id. at 1088.

Moreover, a broad and inflexible three-year holding requirement is not required to protect against the evils purportedly envisioned by Congress. Congress has required, and the Commission currently is adopting rules to implement, comprehensive regulation of basic and other cable service rates, customer service procedures, and various consumer protection measures. See, e.g., 1992 Cable Act, §§3, 8; Notice of Proposed Rulemaking in MM Docket No. 92-266, released Dec. 24, 1992; Notice of Proposed Rulemaking in MM Docket No. 92-263, released Dec. 11, 1992. Aside from the fact that these regulations will protect against adverse effects on rates or customer service, the introduction of such a comprehensive scheme of regulations substantially diminishes the likelihood that a pre-1992 Cable Act purchaser will be able to "profiteer" from a post-1992 Cable Act system sale. See, e.g., Elimination of Broadcast Three-Year Rule, 52 R.R.2d at 1087 ("even the limited time period required for Commission processing of a waiver petition or a transfer involving one of the rule's stated exceptions may deter investment" in broadcast stations). Consequently, the Commission should adopt rules which narrowly interpret the three-year holding requirements of Section 617(a) and provide for expedited waiver procedures, particularly where transfers will replace faltering operators.